



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2010

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2010-14496

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 393121.

The Teacher Retirement System of Texas (the "system") received a request for five categories of information pertaining to the system. You state you have provided some information to the requestor. You inform us you will redact home telephone numbers, home addresses, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.¹ You state you will redact information under sections 552.136 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You also state you will redact system participant records

¹See Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under section 825.507 of the Government Code.³ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.109, 552.111, 552.143, and 552.146 of the Government Code. You also state, and provide documentation showing, that you have notified the Office of the Governor (the "governor"), which is a governmental body to whom a portion of the requested information relates, about the instant request for information in accordance with section 552.304 of the Government Code. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments submitted by the requestor. *See id.*

Initially, you state some responsive information, including e-mails, created before 2003 may be present on magnetic backup tapes maintained only for disaster recovery or business continuity purposes. In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard drive. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state that to restore the information at issue, the system would be required to load the backup tapes and restore the data contained on each tape. Based on this representation, we find you have demonstrated that the locations of the computer files at issue have been deleted from the FAT system. Therefore, we find that any of the requested information that existed only in backup tapes at the time of the request was no longer being "maintained" by the system at the time of the request, and is not public information subject to disclosure under the Act. *See Econ. Opportunities Dev. Corp.*, 562 S.W.2d at 266; *see also* Gov't Code §§ 552.002, .021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude that in this instance, the Act does not require the system to release

³We understand this information is being redacted pursuant to the previous determination issued to the system in Open Records Letter No. 2001-4873 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

⁴We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

any responsive information that was stored remotely on the system's backup tapes on the date of the present request.

Next, you acknowledge the system failed to submit some of the responsive information within the statutory time period prescribed by section 552.301(e) of the Government Code. *See id.* § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the additional submitted responsive information. Furthermore, we will consider the applicability of your remaining claims to the timely submitted information.

You assert that some of the submitted information is excepted under section 552.143 of the Government Code. Section 552.143 provides in part the following:

- (a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.
- (b) Unless the information has been publicly released, pre- and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov't Code § 552.143 (a), (b). You state some of the submitted information consists of pre-investment due diligence information about proposed system investment programs. You state the system did not invest in funds or investment entities related to the proposed programs. Based on your representations and our review of the information at issue, we agree that the system must withhold the information we have marked under section 552.143(b) of the Government Code.⁵

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with

which governmental body has privity of interest or common deliberative process). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the information you have marked includes e-mails and drafts representing the advice, opinion, and recommendations of system employees, officials, and advisors pertaining to specified policymaking matters. You state that final versions of the drafts have been released to the public. You also explain the system, the governor, and the Legislative Budget Board (the "LBB") share a privity of interest and common deliberative process in the information at issue pertaining to appropriations, compensation and communications policies, proposed legislation, budget and investment proposals, and performance measures. Upon review, we determine that you may withhold the information we have marked under section 552.111 of the Government Code.⁶ However, we find that you have not established that the remaining information consists of advice, opinion, or recommendation for section 552.111 purposes. Accordingly, no portion of the remaining information may be withheld on this basis.

We next address your argument under section 552.106 of the Government Code. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(a)-(b). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See Open Records Decision No. 460 at 3 (1987)*. However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See Open Records Decision No. 460 at 1-2 (1987)*; *see also Open Records Decision No. 429 at 5 (1985)* (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). Section 552.106(b) applies to

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. Section 552.106 only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

In this instance, you assert that the remaining information you have marked under section 552.106 consists of working papers involved in the preparation of proposed legislation. As noted above, section 552.106 is narrower than section 552.111. Upon review, we find you have not demonstrated how the remaining information, which consists of purely factual or administrative information, constitutes advice, opinions, and recommendations for purposes of section 552.106. We therefore conclude that none of the remaining information may be withheld pursuant to section 552.106 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless

otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of communications between and among parties identified as system employees, system attorneys, and the governor. You explain that these parties have a common or aligned legal interest in the matter in the information at issue. See generally TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties "concerning a matter of common interest"); see also *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state the communications were made for the purpose of facilitating the rendition of legal services to the system, and were intended to be, and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the system may withhold the information you marked under section 552.107.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983). We note common-law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Upon review of the information at issue, we find the information we have marked is highly intimate and embarrassing and is not of legitimate public concern. Thus, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the system may not withhold any portion of the remaining information under common-law privacy.

Section 552.109 of the Government Code excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the

disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation*, as outlined above. You contend the fax you have identified is private. Although this information is correspondence of an elected office holder, you have failed to demonstrate how the submitted fax constitutes highly intimate or embarrassing information. Therefore, no part of the submitted fax may be withheld under section 552.109 of the Government Code.

You also raise section 552.146 of the Government Code, which excepts from disclosure “[a]ll written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the [LBB.]” *Id.* § 552.146(a). Section 552.146 further provides, however, that “[t]his section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [LBB].” *Id.* § 552.146. You state the remaining information you have marked consists of a memo between the Legislature and an LBB employee that was not used in open or public meetings. However, the remaining information you have marked is contained in a communication from a system employee and consists of the title of the LBB memo at issue. This information does not constitute a communication for the purposes of section 552.146. Accordingly, the system may not withhold any portion of the remaining information under section 552.146 of the Government Code.

We note the remaining information contains personal e-mail addresses subject to section 552.137 of the Government Code.⁷ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses in the remaining information are not of a type specifically excluded by section 552.137(c). As such, the e-mail addresses we have marked must be withheld under section 552.137, unless the owners of the addresses affirmatively consent to their disclosure.

In summary, the system must withhold the information we have marked under section 552.143 of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. The system may withhold the information you have marked under section 552.107 of the Government Code. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold the e-mail

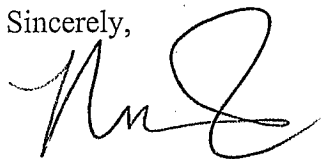
⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

addresses we have marked under section 552.137 of Government Code, unless the owners of the addresses affirmatively consent to their disclosure. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 393121

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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